No. 02-1608

Supreme Court, U.S.
FILED
JUL 22 2003
OFFICE OF THE CLERK

IN THE

United States Supreme Court

GREG RUGGIERO,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER

ROBERT T. PERRY
Counsel of Record
BARBARA J. OLSHANSKY
Center for Constitutional Rights
666 Broadway, Seventh Floor
New York, New York 10012
212-614-6480

Counsel for Petitioner

12 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. SECTION 632(a)(1)(B) WARRANTS INTERMEDIATE SCRUTINY.....	3
II. SECTION 632(a)(1)(B) FAILS INTERMEDIATE SCRUTINY.....	5
CONCLUSION.....	8

TABLE OF AUTHORITIES

Cases *Page*

Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989) 3

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) 5

FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984) 3, 4

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 5

Garcia v. United States, 469 U.S. 70 (1984) 7

Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999) 3, 4

News America Publ'g Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988) 3

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) 7

United States v. Edge Broad. Co., 509 U.S. 418 (1993) 4

Statutes

Radio Broadcasting Preservation Act of 2000, Pub. L. No. 106-553, 114 Stat. 2762 (2000) ... 2, 5

§ 632(a)(1)(B) ..... *passim*

Administrative Rulings

Policy Regarding Character Qualifications in Broad. Licensing, 5 F.C.C. Rcd. 3252 (1990).....6

Liberty Cable Co., 15 F.C.C. Rcd. 25050 (2000) .. 6

Peninsula Comm., Inc., FCC 03D-01 (I.D. June 19, 2003)..... 5

Weiner Broad. Co., 7 F.C.C. Rcd. 832 (Rev. Bd. 1992) 5

Legislative Materials

H.R. Rep. No. 106-567, 106th Cong. (2000) 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

No. 02-1608

GREG RUGGIERO,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONERS

The Government's brief in opposition to the petition makes three propositions plain.[1] First, Section 632(a)(1)(B)

---

[1] Respondents Federal Communications Commission ("FCC"), *et al.*, are collectively referred to as "the Government." The Govern-

of the Radio Broadcasting Act of 2000 ("RBPA"), Pub. L. No. 106-553, 114 Stat. 2762 (2000)—automatically and permanently disqualifying all former unlicensed microbroadcasters from holding low power FM ("LPFM") licenses—imposes an unprecedented draconian sanction. The Government does not dispute—and thus concedes—that no one has ever before been automatically and permanently disqualified from holding a broadcast license because of past misconduct.

Second, Congress enacted Section 632(a)(1)(B) without even considering the adequacy of a readily available, less burdensome alternative—namely, the FCC's traditional character qualification policies for broadcast licensees (Pet. at 5-7)—in ensuring the selection of truthful and reliable LPFM licensees and deterring future unlicensed microbroadcasting. The Government has not cited—and presumably cannot find—any mention, let alone discussion, of the latter policies in the RBPA's sparse legislative history.

Third, given that Congress never addressed the adequacy of the FCC's traditional character qualification policies for broadcast licensees, there is no reason, other than pure speculation (Govt. Br. at 14-15), to believe that these policies would prove any less effective than Section 632(a)(1)(B) in ensuring the selection of truthful and reliable LPFM licensees and deterring future unlicensed microbroadcasting.

---

ment's brief in opposition to the petition is denoted "Govt. Br." The Petition for a Writ of Certiorari is denoted "Pet."

I.

SECTION 632(a)(1)(B) WARRANTS INTERMEDIATE SCRUTINY

The Government argues that intermediate scrutiny applies to broadcast regulations only when the restriction on speech is content-based, citing *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984), and *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999). (Govt. Br. at 12-13) The ban on editorializing at issue in *League of Women Voters* was, however, "at some remove from pure content [regulation], as it forbade 'editorializing' of any kind by the covered stations." *News America Publ'g Inc. v. FCC*, 844 F.2d 800, 812 (D.C. Cir. 1988). *See also League of Women Voters*, 468 U.S. at 418 (Stevens, J., dissenting) ("There is simply no sensible basis for considering this regulation . . . as content-based . . . because it applies equally to station owners of all shades of opinion").

More importantly, the ban on broadcast advertising of private casino gambling at issue in *Greater New Orleans Broad. Ass'n* was a mere restriction on commercial speech. Time and again, this Court has made clear that content-neutral regulations of expressive conduct, including conduct expressive of political views, warrant at least as much First Amendment scrutiny as restrictions on commercial speech. *See, e.g., Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 478 (1989) ("we think it would be incompatible with the asserted subordinate position of commercial speech in the scale of First Amendment values to apply a more rigid standard" than in assessing the validity of content-neutral time, place, and manner regulations

of expressive conduct, "including conduct expressive of political views"); *United States v. Edge Broad. Co.*, 509 U.S. 418, 430 (1993) (same).

In seeking to distinguish *League of Women Voters* from this case, the Government also overlooks a striking parallel between the two cases. Like the ban on editorializing at issue in *League of Women Voters*, which applied only to certain noncommercial broadcasters, Section 632(a)(1)(B) "singles out" a limited, well-defined class of speakers—former unlicensed microbroadcasters—"den[ying] them the right to address their chosen audience on matters of public importance [through the broadcast medium]." 468 U.S. at 384. Indeed, given that Section 632(a)(1)(B) bars former unlicensed microbroadcasters from *ever* engaging in *any* speech over the broadcast medium, it is far more comprehensive—and, in that respect, far more troubling—than the ban on editorializing at issue in *League of Women Voters*. If intermediate scrutiny was warranted there, such scrutiny surely is warranted here.

Contrary to the Government's assertion, petitioner does not raise merely an "abstract disagreement" with the decision below. (Govt. Br. at 13) As Judge Tatel observed, the court of appeals, in effect, applied a rational basis standard, treating Section 632(a)(1)(B) as presumptively valid and disregarding the many ways in which it is poorly tailored. App. 35a.

True, intermediate scrutiny's "narrow tailoring" requirement demands a "reasonable" fit and not "the least restrictive means conceivable." *Greater New Orleans Broad. Ass'n*, 527 U.S. at 188. (Govt. Br. at 13) The ready availability of "obvious less-burdensome alternatives" is, however, "certainly a relevant consideration in determining

whether the 'fit' . . . is reasonable." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 n.13 (1993). Indeed, the availability of such alternatives signals that the fit "may be too imprecise to withstand [intermediate] scrutiny." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 529 (1996) (O'Connor, J., concurring).

II.

SECTION 632(a)(1)(B) FAILS INTERMEDIATE SCRUTINY

The Government asserts that, in the FCC's and Congress's view, an LPFM-specific character qualification provision "was desirable because of the specific and persistent problem of unlawful low power broadcasts." (Govt. Br. at 14) Nothing in the RBPA's sparse legislative history or the LPFM rulemaking record, however, even remotely suggests that the FCC's traditional character qualification policies for broadcast licensees would prove any less effective in addressing that problem.[2]

While unlicensed broadcasting may be associated with the low-power movement (Govt. Br. at 14), such activity is, by no means, exclusive to that movement. *See, e.g., Weiner Broad. Co.*, 7 F.C.C. Rcd. 832 (Rev. Bd. 1992) (broadcast license applicant operated multiple unlicensed full power AM and FM stations during 1980's); *Peninsula Comm., Inc.*, FCC 03D-01 (I.D. June 19, 2003) (full power FM broadcaster continued to operate seven FM translators

[2] Because the FCC barred low power FM broadcasting until very recently, those traditional character qualification policies have never been applied to low power FM broadcasting.

after the FCC rescinded operating authority); *Liberty Cable Co.*, 15 F.C.C. Rcd. 25050 (2000) (wireless cable operator activated 93 operational fixed service microwave paths without prior FCC authorization).

Defending Section 632(a)(1)(B)'s underinclusiveness, the Government suggests that there is no evidence that civil wrongdoers, felons, and the like will apply for LPFM licenses. (Govt. Br. at 14) But there is also no evidence to suggest that civil wrongdoers, felons, and the like will refrain from applying for LPFM licenses. More importantly all applicants who have engaged in prior misconduct pose a risk of unreliable broadcast behavior, regardless of the nature of the misconduct. *Cf. Policy Regarding Character Qualifications in Broad. Licensing*, 5 F.C.C. Rcd. 3252, 3252 (1990) ("an applicant's willingness to violate other laws, and in particular, to commit felonies, also bears on our confidence that an applicant or licensee will conform to FCC rules and policies"). That civil wrongdoers, felons, and the like may face other penalties (Govt. Br. at 14) does not diminish that risk.

Defending Section 632(a)(1)(B)'s overinclusiveness, the Government asserts that in Congress's view, even if former unlicensed microbroadcasters could demonstrate rehabilitation, the possibility that they would remain eligible for LPFM licenses would encourage others to believe that no lasting consequences would flow from unlicensed microbroadcasting. (Govt. Br. at 15) It is far from clear, however, that Congress, as a whole, held such a view. The only relevant legislative finding focuses, *not* on any need for general deterrence, *but rather* on the need to ensure selection of truthful and reliable LPFM licensees. *See* H. Rep. No. 106-567, 106th Cong. 2d Sess. 8 (2000) ("The Com-

mittee concludes that the operation of an unlicensed station demonstrates a lack of commitment to follow the basic rules and regulations which are essential to having a broadcast service that serves the public, and those individuals or groups should not be permitted to receive licenses in the LPFM service").[3]

In any event, it is wholly speculative to believe that the FCC's traditional character qualification policies for broadcast licensees would prove any less effective than Section 632(a)(1)(B) in deterring future unlicensed microbroadcasting, especially given the lack of any debate in Congress or before the FCC on the issue. "When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must . . . demonstrate . . . that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994).

---

[3] "In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation. We have eschewed reliance on the passing comments of one Member, and casual statements from the Floor debates." *Garcia v. United States*, 469 U.S. 70, 76 (1984) (internal citations and quotations omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT T. PERRY
Counsel of Record
BARBARA J. OLSHANSKY
Center for Constitutional Rights
666 Broadway, Seventh Floor
New York, New York 10012
(212) 614-6480

Counsel for Petitioner

July 22, 2003